

2017

## H.B. 17-1233, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017)

Elaine Nolen

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that are meant to create a comprehensive system of decreed water claims in the Gila River system and Little Colorado River system. These adjudications have a history of contention between claimants and this new bill encourages claimants to reach settlements that the courts would recognize and to resolve multiple claims at once. This could result in a significant reduction in the expenditure of time, money, and resources in the Gila Adjudication.

*Camille Agnello*

## COLORADO

**H.B. 17-1233, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017)** (expanding the application of current state law that prevents water saved in a government-sponsored water conservation program from reducing historical consumptive use).

House Bill 17-1233 (“HB 1233”), titled *Protect Water Historical Consumptive Use Analysis*, accomplishes three objectives: (1) to expand application of a preexisting law to water Divisions 1, 2, and 3; (2) to clarify that participation in a government-sponsored program includes water conservation pilot programs; and (3) to limit state agencies that can approve a water conservation program to only those with explicit statutory jurisdiction over water conservation or water rights. Democratic House Representative Jeni Arndt of District 53, located in water Division 1, and Republican Senator Larry Crowder of District 35, located in water Division 2, introduced HB 1233 in the House on March 7, 2017. The House approved the bill on March 24, the Senate approved an amended version on April 17, and Colorado Governor John Hickenlooper signed HB 1233 on May 3.

A historical consumptive use analysis is part of a proceeding to change a water right. A water right owner may only change that right up to the amount of water historically consumed for a beneficial use. Prior to HB 1233, Colorado law provided that in water Divisions 4, 5, and 6, historical consumptive use analyses were not to consider reduction in water usage resulting from participation in a government-sponsored water conservation program. In the initial draft of HB 1233, the sponsors sought to apply this rule to all seven of Colorado’s water divisions. However, at the Senate second reading, the Senate passed Senator Crowder’s proposed amendment to remove water Division 7 of southwestern Colorado from the bill. Senator Crowder explained that feedback from the representative from that water division led him to propose the amendment.

Sponsors introduced HB 1233 with the same legislative intent as the sponsors of Senate Bill 13-019, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013), the bill that established this protection for water right owners in Divisions 4, 5, and 6. Both bills sought to grant water right owners some relief from the “use it or lose it” system. The sponsors brought HB 1233 not as an environmental initiative but as an agricultural one, aimed at providing Colorado farmers wanting to participate in voluntary pilot programs with peace of mind that their water rights would not be diminished. At the hearing before the House Agricultural, Livestock, and Natural Resources Committee, Representative Arndt summarized HB 1233’s objectives to “protect private property rights and agriculture,” “add certainty,” and “consolidate other legislation” so farmers could feel confident pointing to this bill to protect their rights. An example that came up several

times throughout the hearing process involved a conservation pilot program in the town of Gilcrest, located in water Division 2. The pilot program encourages farmers to pump their well water to help combat flooding caused by high ground water levels. However, testimonials explained that farmers would pump water but were still hesitant to reduce use of surface water rights. The sponsors asserted HB 1233 could help instill confidence in farmers to participate in this program and use well water rights instead of their surface water rights.

Opposers on the House Committee expressed concerns that the bill was "overkill" and that it would be better to wait on more complete feedback from pilot programs like the one in Gilcrest to see if expanding the bill to the other divisions was appropriate. The sponsor and witnesses conceded the protections offered in HB 1233 are arguably provided in other legislation, but they defended the bill as a "belt and suspenders" measure and as "another tool in the toolbox" to provide peace of mind to farmers. Testimonials in support of the bill included the Nature Conservancy, Special Advisor for Water Policy to the Governor, Colorado Water Trust, Colorado Water Congress, and an Arkansas Valley farmer. HB 1233 passed this committee with eight votes in favor and five opposed.

Opposers on the Senate Agriculture, Natural Resources, and Energy Committee expressed concern that the bill harmed water users on Colorado's eastern plains by "not being able to quantify [their] historic use" and asserted that water divisions would have come forward if they wanted to be included in the law. A representative from the Colorado River Water Conservation District, which covers Divisions 4, 5, and 6 where the law is in effect, spoke in support of the measure, explaining that the system has worked in these divisions and could work in others areas. HB 1233 passed this committee with six votes in favor and five opposed.

The passing of HB 1233 provides a clear legislative reference to help assure water right owners that participating in government-sponsored water conservation programs will not jeopardize their property rights. While it does have an environmental element to protect conservation, it does not guarantee that water will not be used. If one user conserves water, the next-priority user can still take it out of the river. The bill's protections even have the potential to result in more depletion of the river when a change does occur than without the bill. Upon a change, if an owner's historical consumptive use includes water saved in a conservation program, the formerly conserved water that had not left the river because of the conservation could then be removed from the river and used consumptively after the change. However, regardless of this bill, owners of conserved water can always stop conserving and use the full extent of their water. Without the bill, this risk exists until the water rights are changed, because the actual historical consumptive use limits future use, but because the bill does not count conserved water against the historical consumptive use analysis, the risk remains even after a change. But, in exchange for this risk, the bill encourages conservation. Nevertheless, the bill does have the potential to be a useful tool for entities that work to manage water conservation and water rights in Colorado to help influence and balance water use in the best interest of water right owners and the public.

*Elaine Nolen*